year 1992, receipts for purchase of .25 caliber ammunition, receipts for the use of a firing range, and any other paperwork or writings pertaining to the death of Terese Stewart, including the diaries of Mary and Terese Stewart.

Following the search and examination of the information obtained, neither Petitioner nor anyone else was arrested and no charges were ever filed.

5. Facts Supporting the Application for the Search Warrant

Much of what Petitioner contends should have been included in the application for the search warrant is melodrama rather than facts. Much of the "corrected" affidavit is in random order. Giving Petitioner the benefit of every doubt, and taking Petitioner's "corrected" affidavit at face value, the *facts* which Petitioner contends should have been presented to the California superior court in support of the application for a search warrant, organized in a logical fashion, are:

The death

On June 10, 1992 decedent Terese Stewart was found dead. The cause of death was a bullet wound. The bullet entered the center of her forehead and exited out the back of her head.

The gun

The gun was owned by Petitioner. It had been

given to her by a friend for her protection. Petitioner said she never fired the gun and did not know how to load it or to use it. However, the gun was tested and was found to have been fired numerous times without being cleaned.[1]

The body and blood marks

Decedent's body was found in a bedroom in the garage where she slept. Petitioner said she found the decedent dead in the same position the initial deputy found her. A doctor stated that the decedent's head had been moved from the position in which it was found based on the different paths of blood from the wound. The doctor said this could not have happened naturally.[2]

There were blood spatters and marks on the walls of the decedent's bedroom, to the left and right of where her body was found. Most of them were 4 ½ feet to the left of her body and two feet above her sitting head height. Those spatters and marks were never tested to determine if they belonged to the decedent or were even human blood.

Keys to the house

The doors to the house had a deadbolt which required a key to open or close the door from either side. Petitioner told the investigators that when she arrived

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[1]This statement is not contained in the "corrected" affidavit, but Petitioner never submitted any evidence to dispute it, and omitted it without explanation.

[2]This statement was omitted from the "corrected" affidavit without explanation, even though no evidence was submitted to dispute it.

home, the door was locked.

Petitioner, decedent, John Wesley, Petitioner's son, a housekeeper, and former renters all had keys to the house. In addition, a set of keys to the house had been stolen about a month before the death.

Witness statements

Witness Eric Lutz went to the Stewart home at approximately 9:40 p.m. on the evening of June 9, 1992. Mr. Lutz said no one answered the door. A neighbor, Arlene Wood, said a large male and a female passenger were parked in a car in front of the Stewart home at approximately 10:15 pm. on the evening of June 9, 1992. They stayed there for at least 20 minutes before the neighbor stopped looking out the window.

Interview of Petitioner

Respondent interviewed Petitioner in February of 2002. Most of her statements are addressed in other portions of this summary. Other facts provided by Petitioner are:

Petitioner said she had a discussion with decedent on the morning of June 9, 1992 in which decedent looked worried. Petitioner left for work that morning at 9:00 a.m. Later that day, Petitioner met with Wesley and his wife. She got agreements to control reckless spending, and discussed Wesley's failure to produce investment money and to invest his own money. The meeting was heated. During the afternoon portion of the meeting, Wesley attacked her based on narcissistic personality disorder and

an article she had reviewed the previous day. Wesley ended the meeting by saying he would make Petitioner cry. He asked what time she would be home and she said 11:00 to 11:30 p.m.

Petitioner said Wesley had brought decedent to tears several times. Petitioner said Wesley likes to bring women to tears, and was angry because Petitioner had not cried.

Petitioner called decedent on the afternoon and early evening of June 9, 1992 but got decedent's answering machine. Petitioner arrived home about midnight. She did not see decedent that evening.

The following morning, Petitioner's dog went inside the garage bedroom and Petitioner followed the dog. Petitioner saw decedent sitting, but realized something was wrong. Petitioner called 911. She then went back, touched decedent, realized decedent was dead, and backed out of the room.

Petitioner denied killing decedent. Petitioner initially agreed to take a polygraph examination. Petitioner, through her attorney, then asked to have the examination continued and later refused to take a polygraph examination.

Petitioner said she had notes and documents which were relevant to the investigation. This included a tissue Wesley said he had found by decedent's bed with blood spots on it. Petitioner provided the tissue to Respondent. She mentioned many additional items useful to the investigation and offered to provide them, some of which Respondent took.

Statements from and about Wesley

John Wesley had business connections with Petitioner and decedent in 1991 and 1992. Wesley said Petitioner and decedent had told him that Petitioner's father had sexually molested Petitioner, and Petitioner in turn had sexually molested decedent. Wesley also said Petitioner and decedent had an ongoing lesbian relationship. Wesley said decedent told him Petitioner was evil and she was becoming evil like her mother. Wesley said Petitioner murdered decedent in order to cover up their lesbian relationship.

Wesley denied having anything to do with the death, but had no alibi for June 9, 1992 after 10:30 p.m. Witness Orndorff said he left Wesley at approximately 10:00 p.m. on June 9, 1992. Witness Lynn Wesley (Mr. Wesley's wife) said she and Mr. Wesley stopped by the Stewart home at approximately 10:30 p.m. on June 9, 1992 to do some computer work, but no one was home and they did not go inside.

Wesley had a key to the Stewart house and could come and go as he pleased. Wesley initially said he was to be at the Stewart home on June 9, 1992 between 6:00 to 7:30 p.m., but later changed the time to between 8:00 and 9:00 p.m. On June 9, 1992, Petitioner and Wesley had a "tooth and nails" fight because Petitioner told him he had a narcissistic personality. Wesley later told witness Peggy Taylor that decedent was killed by narcissistic personality. Wesley expressed "venom" toward Petitioner. He told witness Judy Wagner he told Petitioner before her death that he would make her cry. Wesley went to the Sheriff's Department the day after decedent was discovered and

again a month later.

Wesley said he did not go into decedent's bedroom until all the blood had been cleaned up, but inconsistently said he went inside while Petitioner was gone from the house and saw a "real fine mist" of blood high on the wall. Wesley gave three different stories about how decedent died. He said he searched every room of the house when Petitioner was gone. He later told someone he ordered the blood washed from the walls while Petitioner was not home.

Wesley said he had a computer program decedent had prepared. After being accused of murdering decedent for the program, Wesley said the program was worthless. Witness Judy Wagner said Wesley hired her to finish the program prepared by decedent. She said the program was worth $1200-$1500 per sale. Wesley repeatedly told witness Judy Wagner he was the last person to see decedent alive, said he was a suspect, and often defended himself.

Wesley engaged in financial scams which exceeded $1,000,000 between 1987 and 1992. Wesley was excommunicated by his church for fraud of fellow church members. Several lawsuits were filed against Wesley from 1992-1997. Petitioner filed a lawsuit against Wesley for fraud, theft and embezzlement and was awarded $1.7 million in 1994. Wesley never paid any part of the judgment. Wesley has accused Petitioner of child molestation, being promiscuous with men, being a lesbian and killing decedent. Petitioner denied ever being sexually abused by her father, and denied any type of sexual relationship with decedent.

Wesley brought people to tears and was feared by some witnesses. Wesley was violent; this included an assault on his third wife which resulted in permanent injury to her, and he beat his daughter. Wesley verbally harassed Petitioner and her son until he received a phone call from police asking him to come in for questioning.

In 1995, Wesley was prosecuted by the Riverside County District Attorney for crimes against Petitioner, including felony fraud. Wesley entered a plea bargain and was sentenced to one year in jail. Other victims of Wesley wrote letters to the judge.

Respondent did not talk to any witnesses about Wesley and did not interview Wesley in person. The private investigator Petitioner hired concluded that Wesley murdered decedent.

Relevance of the evidence to the criminal investigation

Petitioner told Respondent that she had documents and other evidence relevant to the criminal investigation.

REASONS FOR DENYING THE PETITION

A. UNDER SETTLED LAW, A LAW ENFORCEMENT OFFICER IS NOT LIABLE FOR ERRORS IN AN APPLICATION FOR A WARRANT UNLESS THE WARRANT WOULD NOT HAVE BEEN ISSUED WITHOUT THOSE ERRORS

Law enforcement officers seek tens to hundreds of thousands of search warrants and arrest warrants every

year. A substantial portion of the applications for those warrants contain errors, ranging from misspellings and transposed numbers at one end of the spectrum to intentional fabrication at the other end, and everything imaginable between. The Fourth Amendment requires probable cause, not certainty or perfection. As long as probable cause exists, any errors not relevant to that question are immaterial and harmless. It is therefore settled that an error in an application for a warrant is not a basis for setting aside the warrant, or for holding the officer liable, unless the warrant would not have been issued absent that error.

1. Criminal Cases

The seminal case is Franks v. Delaware, 438 U.S. 154 (1978). In that case, the criminal defendant contended a warrant was invalid because the application contained errors. This Court held that a warrant is valid unless the criminal defendant can show both false statements and that the warrant would not have been supported by probable cause if those errors had not been made.

Circuit cases uniformly apply this same standard, and reject contentions that warrants are invalid because some facts were omitted or some aspects of the application were erroneous, as long as probable cause remains when the application is "corrected" to take these allegations into account. United States v. Capozzi, 347 F.3d 327, 332 (1st Cir. 2003), cert. den., 540 U.S. 1168 (2004); United States v. Cornfield, 212 F.3d 713, 717-718 (2nd Cir. 2000); United States v. Burton, 288 F.3d 91, 103 (3rd Cir. 2002); United States v. Simmons, 206 F.3d 392, 402 (4th Cir. 2000); United States v. Cavaros, 288 F.3d 706, 710 (5th Cir.

2002); United States v. Newton, 389 F.3d 631, 635 (6th Cir. 2004); United States v. Jackson, 103 F.3d 561, 574 (7th Cir. 1996); United States v. Stropes, 387 F.3d 766, 771 (8th Cir. 2004); United States v. Celestine, 324 F.3d 1095, 1102 (9th Cir. 2003); United States v. Chavez-Miranda, 306 F.3d 973, 979 (9th Cir. 2002); United States v. Bosham, 268 F.3d 1199, 1204 (10th Cir. 2001), cert. den., 535 U.S. 945 (2002); United States v. Burstron, 159 F.3d 1328, 1333 (11th Cir. 1998).

2. Civil Cases

Although this Court has not addressed the question in a civil case, the federal circuits uniformly apply the same standard to civil cases. The circuits uniformly hold that errors and omissions are not a basis for liability unless the warrant would not have been supported by probable cause if the alleged errors and omissions had not occurred. Burke v. Town of Walpole, 405 F.3d 66, 82 (1st Cir. 2005); Velardi v. Walsh, 40 F.3d 569, 574 (2nd Cir. 1994); Wilson v. Russo, 212 F.3d 781, 786-787 (3rd Cir. 2000); Wilkes v. Young, 28 F.3d 1362, 1365 (4th Cir. 1994), cert. den., 513 U.S. 1151 (1995); Freeman v. County of Bexar, 210 F.3d 550, 553 (5th Cir. 2000); Hale v. Kart, 396 F.3d 721, 726 (6th Cir. 2005); Hayward v. City of Chicago, 378 F.3d 714, 719 (7th Cir. 2004); Turpin v. City of Rock, 262 F.3d 779, 783 (8th Cir. 2001); Hervey v. Estes, 65 F.3d 784, 788 (9th Cir. 1995); Wolford v. Lasater, 78 F.3d 484, 489 (10th Cir. 1996); Dahl v. Holley, 312 F.3d 1228, 1235 (11th Cir. 2002).

Settled law was summarized in Hervey v. Estes, 65 F.3d 784, 788 (9th Cir. 1995).

> In sum, a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant. Put another way, the plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause. The showing necessary to get to a jury in a section 1983 action is the same as the showing necessary to get an evidentiary hearing under *Franks*. [Citation] (Emphasis in original)

Part of the reason for this rule is that causation is an essential element of every civil rights lawsuit. An error or omission which would not have affected the decision whether to issue the warrant causes the recipient of the warrant no harm. Cases addressing a wide variety of errors in criminal procedure find no basis for liability unless the errors actually caused injury to the plaintiff. See, e.g., U.S. v. Patane, 542 U.S. 630 (2004) (failure to provide *Miranda* warnings is not a basis for civil liability unless the statements actually cause injury by being used against the defendant); Hensley v. Carey, 818 F.2d 646 (7th Cir. 1987) (an improper lineup is not a basis for civil liability unless it actually caused injury by violating the right to a fair trial); Landrigan v. Warwick, 628 F.2d 736, 744-745 (1st Cir. 1980) (false statements in a police report are not a basis for liability unless they actually caused injury or damage); Zahrey v. Coffey, 221 F.3d 342, 348 (2nd Cir.

2000) (fabrication of evidence is not a basis for civil liability unless the evidence is actually used and actually causes injury to the plaintiff).

This Court just reaffirmed that rule in Hartman v. Moore, 126 S.Ct. 1695 (2006). In Hartman, the plaintiff contended criminal investigators had induced the prosecutor to file charges in retaliation for protected speech. This Court held that, in addition to proving retaliation, the plaintiff also has to prove a lack of probable cause as a prima facie element of the case, because that is an essential element of proving causation.

In summary, if a warrant would have been supported by probable cause whether or not the errors had been made, and whether or not the omitted facts had been included, then the errors and omissions caused no damages and are not a basis for liability.

3. The Courts below Applied Settled Law

The district court accurately summarized Ninth Circuit law in its order. (App. 7-8) The Ninth Circuit's opinion also accurately summarized settled Ninth Circuit law. (App. 2) Petitioner makes no contention that either court failed to apply that law to the facts.

B. THE DECISIONS BELOW ARE SUPPORTED BY THE RECORD

Both the district court and the Ninth Circuit expressly found probable cause for the warrant even if Petitioner can prove everything she alleges. (App. 2; App. 15-17) The district court found it undisputed that the

search warrant was obtained as part of an ongoing investigation (App. 5), and the Ninth Circuit affirmed the entire judgment and denied a petition for rehearing which contended there is a factual dispute about the existence of an ongoing investigation. Petitioner asks this Court to review the record to determine whether probable cause exists, and to determine whether there was an ongoing investigation, rather than to decide issues of law. That is not the function of a Supreme Court.

At any rate, the decisions of the district court and the Ninth Circuit are amply supported by the record. Petitioner contends there were 31 separate false statements and omitted facts. That number is both manufactured and irrelevant. First, Petitioner took single statements from the application, found separate bases for disagreeing with those statements, and counted each separate reason as a separate error.[3]

Second, much of what Petitioner contends should have been included in the application has no relevance to the search warrant.[4] Much of Petitioner's argument, and most of the alleged errors and omitted facts, address *who* killed Terese Stewart. That issue is irrelevant. Probable cause is not certainty, but only a "fair probability" based on

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[3]For example, Petitioner counts separately the facts which led to a lawsuit against Wesley, the existence of a judgment in that lawsuit, and lack of payment of the judgment.

[4]For example, Petitioner listed as a significant omitted fact her contentions that Mr. Wesley is a bigamist. It is a mystery why that has the slightest possible relevance.

the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause for a search warrant exists if there is evidence that *someone* committed a crime and the evidence at issue is relevant to the investigation of that crime. It is completely irrelevant to the analysis whether there was probable cause to believe that the person whose property is searched is guilty of a crime, or for that matter, that any specific person is guilty of the crime. Search warrants are proper even if the police have no idea who committed a crime, as long as the evidence sought in the warrant application might be useful to determine who committed the crime. This Court resolved that question decades ago.

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.
>
> . . .
>
> Against this background, it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. And if those considered free of criminal involvement may nevertheless be searched or inspected under civil statutes, it is difficult to understand why the Fourth Amendment would prevent entry onto their property to recover evidence of a crime not committed by them but by others. As we understand the structure and language of the

> Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises. The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena *duces tecum*, whether on the theory that the latter is a less intrusive alternative or otherwise. Zurcher v. Stanford Daily, 436 U.S. 547, 556, 559 (1978).

Circuit courts agree that even if the officers lack probable cause to believe that the person whose property is searched committed the crime under investigation, probable cause for the search nevertheless exists as long as it is reasonably probable that evidence of the crime will be discovered as a result of the search. United States v. Fowlie, 24 F.3d 1059, 1066-1067 (9th Cir. 1994) (statement that a particular person was suspected of the crime was immaterial to an application for a search warrant since there was probable cause to believe that a crime had been committed and evidence of it would be found at the location); United States v. Hay, 231 F.3d 630, 635 (9th Cir. 2000) (search warrant was properly issued to search a specific computer even absent evidence that the owner of the computer was guilty of a crime, because there was probable cause to believe that the computer contained

evidence of a crime); United States v. Tehfe, 722 F.2d 1114, 1117-1118 (3rd Cir. 1983), cert. den., 466 U.S. 904 (1984) ("The affidavit in support of a warrant need not present information that would justify the arrest of the individual in possession of or in control of the property. Nor is it required that the owner be suspected of having committed a crime. Property owned by a person absolutely innocent of any wrongdoing may nevertheless be searched under a valid warrant.").

The district court and the Ninth Circuit both applied this standard, and both found that the information sought by the warrant was relevant to the investigation of the death of Terese Stewart. (App. 13, App. 2) The record amply supports their decisions. First, there is no dispute that decedent was found dead as a result of a gunshot wound. Although the death was initially ruled a suicide, Petitioner herself agrees there was a reasonable basis for believing that the death was caused by someone else and was not a suicide.

Second, the district court and the Ninth Circuit both reviewed the record and had no trouble finding undisputed evidence of an ongoing investigation. Although the investigation had been closed earlier, it was re-opened at the request of the California Attorney General's office. The record shows that Mr. Silva was assigned the duty to conduct the investigation in December of 2000. He reviewed extensive case files and talked to some witnesses, talked to Petitioner, and the application for the search warrant was filed in March of 2001, shortly after the case was assigned to him for investigation. (App. 5)

Third, there was a reasonable basis for believing

that the evidence for which the search warrant was sought would be relevant to the investigation into the death of the decedent. Petitioner herself admitted she had evidence relevant to the investigation. (App. 13-15) Petitioner's opposition to the motion for summary judgment and the briefs filed in the Ninth Circuit never questioned the relevance of the evidence to the investigation of the death.

Those facts, by themselves, are sufficient to support the judgment. The district court properly concluded that at the time of the application for the search warrant, there was probable cause to believe that a crime had been committed and that evidence relevant to the crime would be found at the specified location. Nothing more is required.

C. RESPONDENT'S ALLEGED MOTIVE IS IRRELEVANT

Petitioner contends Respondent's alleged motive in applying for the search warrant invalidates an otherwise valid warrant. The district court found no factual basis for Petitioner's contention that the warrant was sought to retaliate against Petitioner rather than as part of an ongoing investigation, and the Ninth Circuit affirmed that decision.

At any rate, Respondent's alleged motive is irrelevant. This Court repeatedly has held that all claims based on the Fourth Amendment are addressed under an objective reasonableness standard. Under that standard, a "good" intention will not create probable cause which otherwise does not exist, and a "bad" intention will not defeat probable cause which otherwise does exist. Whren v. U.S., 517 U.S. 806, 813 (1996) ("Subjective intentions

play no role in ordinary, probable-cause Fourth Amendment analysis"); Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (same).

The same rule applies to qualified immunity. Since qualified immunity is judged by an "objective reasonableness" standard, it is settled that a "good" intent will not excuse a violation of clearly established law, and a "bad" intent will not defeat qualified immunity when there has been no violation of clearly established law. Crawford-El v. Britton, 523 U.S. 574, 588 (1998) ("a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated . . . the defendant's subjective intent is simply irrelevant").

Thus, Petitioner's arguments about Respondent's motive, even if they were supported by evidence rather than mere allegations, are simply irrelevant.

D. THERE IS NO BASIS FOR A SEPARATE DUE PROCESS CLAIM

Petitioner contends she has a separate substantive due process claim based on the application for the search warrant. As pointed out below, that claim was not raised in the courts below. In addition, this Court repeatedly has held that if a specific constitutional provision applies, there can be no separate substantive due process claim. Albright v. Oliver, 523 U.S. 420 (1994); Graham v. Connor, 490 U.S. 386 (1989). In Conn v. Gabbert, 526 U.S. 286, 293 (1999), this Court held that no separate due process claim can be based on the application for a search warrant, because the Fourth Amendment applies to applications for

search warrants.

E. CLAIMS BASED ON THE FIRST AMENDMENT AND SUBSTANTIVE DUE PROCESS WERE NOT RAISED BELOW

Much of the petition addresses issues Petitioner failed to raise in the district court or in the Ninth Circuit. Except in extraordinary cases, this Court will not address issues not litigated in the courts below. Glover v. United States, 531 U.S. 198, 205 (2001). The petition does not mention any extraordinary reasons why this Court should address issues not raised below; in fact, the petition never acknowledges that it raises issues not mentioned in the courts below.

The district court opinion is limited to the Fourth Amendment claim precisely because that was the only issue Petitioner asserted by the time the motion for summary judgment was argued. (App. 6-7) The Ninth Circuit opinion is similarly limited to the Fourth Amendment claim because that was the only issue raised on appeal. The Ninth Circuit opinion succinctly summarizes the lone issue to be decided:

> As her counsel acknowledged at oral argument, her claim is dependent on the search warrant's being unlawful. (App. 2)

Thus, claims based on the First Amendment and claims based on substantive due process are not properly before this Court.

If these issues had been raised in the district court,

Respondent would have submitted additional evidence to respond to them. For example, he could have presented evidence to show why he obtained the evidence by way of a search warrant rather than other means, and could have presented evidence of his intentions if his intentions had been a relevant issue. None of that evidence is in the record precisely because those issues were not raised prior to the present petition.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition should be denied.

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